BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

LESLIE E. WIEMER
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-393
Case No. 77-8575

S.S.A. No.

JOSEPH MAGNIN COMPANY
(Employer)

Employer Account No.

Office of Appeals No. S-2182

Pursuant to the provisions of section 413 of the California Unemployment Insurance Code, the Appeals Board assumed jurisdiction of this case subsequent to the issuance of the administrative law judge's decision denying the claimant's application to vacate the decision under section 5045(e), Title 22, California Administrative Code.

STATEMENT OF FACTS

The claimant separated from her employment, under circumstances not germane to this decision, on or about March 24, 1977. She thereafter moved to Oregon where she filed a claim for unemployment insurance benefits on May 22, 1977. On July 15, 1977 the Department issued its determination and ruling in which it held the claimant not disqualified for benefits and the employer's reserve account subject to charges under sections 1030 and 1032 of the code. The employer filed a timely appeal on July 26, 1977.

On August 26, 1977 the Oakland Office of Appeals mailed a notice of hearing to the claimant advising her of the date and time of the hearing (September 16, 1977,

at 10:30 a.m.). Included in that notice were instructions to the claimant to call the Appeals Office collect at the time indicated on the notice of hearing. On the appointed day the employer appeared at the Oakland Office of Appeals, but the claimant did not call as she was instructed.

The administrative law judge took testimony and issued a decision which reversed the Department's determination and ruling. A copy of this decision was mailed to the claimant on September 21, 1977. During the course of the hearing the administrative law judge admitted into evidence an exhibit which showed that the claimant had been disabled and unable to work from March 19, 1977 through May 25, 1977, but that as of the latter date she was able to resume full-time work.

The claimant filed a timely request to vacate the decision pursuant to section 5045(e), Title 22, California Administrative Code. In her request postmarked October 3, 1977, and in a clarifying letter postmarked October 11, 1977, the claimant stated that she did not call the Oakland Office of Appeals as instructed on September 16 because she was working at the time and could not get away to a telephone at the appointed hour. She did not state whether or not she tried to communicate with the Oakland office either by letter or by telephone prior to the hearing date.

The administrative law judge issued an order denying the claimant's application to vacate on October 25, 1977, citing the following as his reasons for doing so:

> "The claimant stated she was working on the date of hearing and could not get to a telephone to advise the Appeals Office. She did not call at any time during the day of the hearing--nor did she call on any prior day to advise that she was working or to request a continuance. She has advanced no reason for making no effort to contact the Appeals Office on or prior to the date of hearing."

In the claimant's letter to the Appeals Office on October 11, 1977 the claimant referred to a letter that was sent to the Appeals Office by her doctor. This letter was not brought to the administrative law judge's attention before he issued his order, although it had

been received in the office prior to October 25. The doctor in his letter confirms the fact that the claimant was disabled during the period indicated in the exhibit admitted into evidence by the administrative law judge, and he stated that it was his opinion that the claimant quit her work because of the disability. The doctor's letter did not address the issue of the claimant's failure to make her appearance in person or by telephone at the September 16 hearing.

REASONS FOR DECISION

Section 5045(e), Title 22, California Administrative Code reads, in part, as follows:

> "If a party to an appeal other than the appellant or petitioner fails to appear at a hearing and the administrative law judge issues a decision on the merits adverse to the party's interest, the administrative law judge's decision shall be accompanied by a statement concerning the right to make application to vacate the decision. . . . Upon a showing of good cause for failure to appear at the hearing, an administrative law judge shall issue an order vacating the decision and the matter shall be set for further hearing in accordance with rule 5029. Lack of good cause will be presumed when a continuance of the hearing was not requested promptly upon discovery of the reasons for inability to appear at the hearing. . . ."

The presumption referred to above is, of course, not conclusive but is rebuttable, and it affects the burden of producing evidence since its purpose is to facilitate determination of the action in which it is applied (Evidence Code, sections 603 and 605). In other words, the burden is on the moving party to produce some evidence from which it can be inferred that there were valid reasons for the claimant's inability to appear at the hearing. The logical inference to be drawn from failure to request a continuance is that there was no good reason for such continuance or that the reasons advanced were not valid.

The term "good cause" is used a number of times in the Unemployment Insurance Code, and the various code

sections define it as including, but not being limited to, mistake, inadvertence, surprise, or excusable neglect (section 1330, California Unemployment Insurance Code).

The most authoritative discussion of the term "good cause" appears in the California Supreme Court's decision in Gibson v. Unemployment Insurance Appeals Board (1973), 9 Cal. 3d 494, 108 Cal. Rptr. 1. Although the statute under examination in that case dealt with the extension of the applicable 10-day period in which to file an appeal from a Department determination, the rationale would apply to the term "good cause" used in section 5045(e), Title 22, California Administrative Code. Section 1328 of the code provided that the 10-day period may be extended for "good cause." In the Gibson case the claimant retained legal counsel to file an appeal and, because of workload pressures and a calendaring error, the attorney filed the appeal three days beyond the 10-day period.

The court held that the code should be construed liberally so as to give effect to the legislative intent of ". . . providing benefits for persons unemployed through no fault of their own. . . ." (Unemployment Insurance Code, section 100) In this regard it was stated that "To construe the code liberally to benefit the unemployed, and to dispense with the formality in administrative adjudication, does not accord with a draconian rule that the slightest and most excusable inadvertence will deprive a worker of his right to an appeal on the merits."

On the other hand, to hold automatically that any excuse advanced by a claimant would constitute "good cause" no matter how devoid of merit it may be, would be just as unreasonable and inflexible a policy as that condemned in Gibson.

Furthermore, this approach ignores the presumption in section 5045(e), Title 22, California Administrative Code, which is not present in section 1328 of the code. Accordingly, the court had no occasion to apply its rule concerning good cause to a factual situation involving the presumption. The presumption facilitates a determination of the action and it operates to terminate cases wherein the affected party is not diligent in pursuing his claim. Insofar as the issue of good cause is concerned, the court in Gibson held that there was a

middle ground between the two extremes which both recognizes the right of the diligent claimant to have his case decided on the merits and facilitates the orderly administration of the law. It stated that the Appeals Board must consider, in regard to late appeals, the shortness of the delay, the absence of prejudice, and the excusability of the error. These or similar factors should likewise be appropriate in determining whether or not the reasons advanced by the claimant in the instant case constitute good cause for her failing to appear at the hearing.

In Appeals Board Decision No. P-B-365 the Board considered an appeal from an order dismissing a claimant's application to reopen pursuant to section 5045(e), Title 22, California Administrative Code. In finding that good cause existed in that case, consideration was given to the factors suggested in the Gibson case. The facts presented in P-B-365, however, are sufficiently distinguishable from those in the instant case. In the former case an emergency involving a person close to the claimant had arisen on the very morning of the scheduled hearing. The claimant in that case was prevailed upon to transport the third party and her child to a hospital for treatment. Although this emergency prevented the claimant from proceeding to the hearing, he did telephone the local office where the hearing was to be held and explained his situation. The Board held in that case that under circumstances where the claimant had made a reasonable effort to communicate the reasons for his absence to the administrative law judge, his absence from the hearing as a result of responding to an emergency situation constituted good cause for his failure to appear.

No such factual matrix exists in the present case. Not only is the reason given for the claimant's absence from the hearing less than compelling, no effort was made to communicate with the Office of Appeals prior to the hearing to apprise the administrative law judge of her inability to attend. Not until after the issuance of a decision adverse to the claimant did she explain her reason for not attending the hearing.

As indicated in the statement of facts, the only reason advanced by the claimant for her failure to appear was that she was working. One of the inescapable realities facing both claimants and employers is that all hearings are conducted between the hours of 8 a.m.

and 5 p.m. during the workweek. The claimant's reason for not appearing, standing alone, does not constitute good cause for vacating the administrative law judge's decision since the granting of a new hearing will necessarily require that she absent herself from work so she can attend, unless other arrangements can be made which are mutually acceptable to each party and the administrative law judge. Possible alternatives would include a hearing scheduled during the claimant's lunch hour attended either by telephone or in person, or at a time during the day acceptable to the claimant's current employer. But such alternatives were available to the claimant at the time of the original hearing. Thus, a finding of the existence of "good cause" in this case would place the claimant in no different a situation than she was in on September 16, 1977. Of course the feasibility of the alternatives is not the paramount issue in this case. It is the claimant's failure to make a reasonable effort to communicate with the local office of appeals which is critical.

While the claimant's doctor submitted evidence of the claimant's condition, it does not bear on the reason the claimant did not make an appearance at the hearing and is of no probative value in deciding this procedural issue. In addition, the circumstances of this case suggest that if in fact the claimant was working and therefore could not make the telephone call, she had ample opportunity (21 days) between the date she received the notice of the hearing and the hearing itself to contact the Oakland Office of Appeals and request a continuance. Her excuse for failing to make such an effort, measured by the parameters set out in Gibson, is not convincing and does not overcome the presumption that she had no good cause for failing to appear at the hearing.

The evidence in this case supports the administrative law judge's order denying the claimant's application to vacate the decision.

DECISION

The decision of the administrative law judge is affirmed. The claimant's request to vacate the decision is denied.

Sacramento, California, May 25, 1978.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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